SOUTHERN CALIFORNIA EDISON
An EDISON INTERNATIONAL Company

Akbar Jazayeri
Vice President of Regulatory Operations

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Fred Harris
Legal Division
California Public Utilities Commission
505 Van Ness Ave., Room 5040
San Francisco, CA 94102-3298

Re: Comments of Southern California Edison Company on Revised Draft Resolution L-436

Dear Mr. Harris:

Southern California Edison Company (SCE) submits the following comments on Revised Draft Resolution L-436 (Draft Resolution).[1] The Draft Resolution aims to improve public access to records of the California Public Utilities Commission (Commission or CPUC) by replacing General Order (GO) 66-C with a new GO 66-D. The Draft Resolution does not propose a final version of GO 66-D, but rather calls for workshops to further refine the draft general order. Commission staff circulated the Draft Resolution on December 14, 2012. Comments were initially due on December 28, 2012, but the deadline was subsequently extended to January 11, 2013. SCE appreciates the opportunity to comment on the Draft Resolution. Due to time constraints and the length and complexity of the Draft Resolution, the following comments address only selected key issues. SCE reserves the right to comment further on the Draft Resolution at future opportunities.

As an initial matter, SCE agrees that the Draft Resolution and the contemplated workshops should not address changes to the matrices adopted by Decision (D.) 06-06-066. SCE previously "note[d] that the D.06-06-066 matrixes were adopted after a lengthy proceeding that began in 2005 and ended in 2011, involved many parties, hundreds of documents, and 16 CPUC decisions."[2] The Draft Resolution properly refrains from amending the D.06-06-066 matrices and concludes that "D.06-06-066 matrices may be re-evaluated in accord with the process discussed in R.05-04-030, or in response to petitions for modification, but not in our proposed workshops."[3]

Although the Draft Resolution will not modify D.06-06-066, it may benefit from the lessons learned during that process. As described above, the Commission ensured public access to procurement-related information by working with parties through a formal rulemaking. This somewhat informal effort to overhaul the Commission's general approach to public records has featured three drafts of a proposed resolution, three rounds of comments, and a workshop.

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[1] SCE submitted comments to earlier versions of Draft Resolution L-436 on April 25, 2012 (jointly with Pacific Gas and Electric Company) and on July 27, 2012. SCE incorporates its previous comments to the extent they apply to the current draft.

[2] Draft Resolution at 79-80.

[3] *Id.* at 80.

Although interested parties' comments have been solicited, the Draft Resolution has evolved into a significantly broader, more complex, and more problematic proposal than originally contemplated. The Draft Resolution thus contemplates more workshops, more revisions to the draft GO 66-D, and more rounds of comments. However, because it is not a formal rulemaking, there is no official service list, and certain parties have not received documents in a timely manner. Parties also lack the procedural safeguards of the Public Utilities Code and the Commission's Rules of Practice and Procedure, which would apply in the case of a formal, docketed proceeding. While SCE does not request a formal rulemaking at this time, SCE expects the Commission will want to ensure due process throughout the development of GO 66-D.

The Commission could advance due process by postponing consideration of the Draft Resolution. By its own terms, the Draft Resolution is incomplete. The purpose of this effort is to replace GO 66-C, but the new GO 66-D "awaits further refinement in workshops and comments."[4] The future workshops and comments are likely to reveal significant disagreements and require extensive consideration and redrafting, as evidenced by the history of this Draft Resolution. SCE respectfully requests that the Commission delay a formal action on the Draft Resolution until it actually resolves the Commission's approach to public and confidential records.

As noted previously, SCE supports the Commission's efforts to update its approach to public access to records. The following comments are intended to improve and clarify the Draft Resolution's current proposal.

The Draft Resolution Continues to Conflict with Section 583

The Commission's policy on public access to records must comply with the statutory protections of Public Utilities Code Section 583. When a state agency adopts a regulation, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."[5] "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations."[6] The Draft Resolution proposes to regulate information provided to the Commission by utilities. Accordingly, it must be consistent with Section 583, which states that:

> No information furnished to the commission by a public utility …. except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding.

This statute requires the Commission to issue an order prior to disclosing information that a utility identifies as confidential. The Draft Resolution conflicts with Section 583 by claiming that Section 583 does not "prevent us from adopting the presumption that information furnished by

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[4] Draft Resolution at 134 (Ordering Paragraph No. 1).
[5] Gov't Code § 11342.2.
[6] *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967).

utilities is public, unless the utility requests and is granted confidential treatment."[7] Commission staff, under the Draft Resolution, are delegated the authority to grant confidential treatment.[8]

Both of these elements impermissibly impair the scope of Section 583. The plain language of the statute cannot be read to allow a presumption of public access or a disclosure decision made by staff. The intent of Section 583 is to encourage utilities to share information by promising that information will only be disclosed if the commissioners approve a particular request for disclosure. The Draft Resolution nullifies Section 583 by authorizing disclosure without any Commission review of the information.

The Draft Resolution also fails to respect Section 583 as legislation coequal to the California Public Records Act (CPRA). Section 583 guarantees utilities that their confidential information cannot be disclosed unless the Commission takes specific action and gives the utility an opportunity to be heard. The CPRA does not supersede Section 583. In fact, the opposite is true: the CPRA recognizes that Section 583 imposes limits on disclosure. The CPRA lists statutes that "may operate to exempt certain records, or portions thereof, from disclosure."[9] The CPRA also acknowledges that the listed statutes may trigger the exemption for records whose "disclosure … is exempted or prohibited pursuant to federal or state law."[10] Section 583 is listed as such a statute exempting records from disclosure.[11] The Draft Resolution thus contradicts the CPRA by eliminating Section 583's procedural guarantees.

The Draft Resolution Fails to Adequately Protect Utility Employees' Right to Privacy

All people have a constitutional right to privacy.[12] Accordingly, the CPRA exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[13] A two-part test determines whether the exception applies: disclosure is not required if (1) it would compromise substantial privacy interests, and (2) the potential harm to privacy interests outweighs the public interest in disclosure.[14] Employees generally have a strong privacy interest in personnel and similar information.[15]

The second part of the test requires balancing the harm in disclosure against the public's interest in disclosure. For purposes of the CPRA, the public's interest is limited to ensuring the proper functioning of government.[16] The public may have curiosity regarding a private company such as a utility, but it only has a CPRA-recognized interest in examining government operations. Thus, the Draft Resolution errs when it states that "[w]hen we determine to disclose, or refrain from disclosing, personal information in our safety-related records, a primary consideration will [be]

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7 Draft Resolution at 45.
8 *See* Draft Resolution at 37-38.
9 Gov't Code § 6275.
10 *Id.* at §§ 6254(k), 6276.
11 *Id.* at § 6276.36.
12 Cal. Const art. I, § 1.
13 Gov't Code § 6254(c).
14 *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 755 (2006).
15 *Id.* at 756-57.
16 *See* Gov't Code § 6250.

whether disclosure will shed light on a utility's performance of its safety responsibilities."[17] The Commission may only disclose personnel information based on the two-prong test. Under that test, the relevant consideration is whether the information will shed light on the Commission's performance, not the utility's performance.

This restriction is illustrated by the Draft Resolution's lengthy excerpt of the *BRV* decision.[18] In that case, a media organization sought information regarding misconduct by a school district superintendent.[19] The court allowed disclosure because of "[t]he public's interest in judging how the elected board treated this situation" and the superintendent's "position of authority as a public official."[20] However, the public's interest was not furthered by knowing the names of other people involved, including those of public employees (staff and faculty members). The court thus ordered the redaction of their names prior to disclosure.[21] The public would presumably have even less of an interest in obtaining the names of private companies' employees, whose actions are unlikely to shed light on the Commission's performance. The Draft Resolution misinterprets *BRV* as justifying disclosure when "professional competence is at issue."[22] Instead, disclosure depends on whether the professional competence of a government agency or official is at issue.

Utilities Should Receive Notice Prior to the Disclosure of Confidential Information

The federal government requires agencies to notify submitters of confidential information if the agency intends to disclose the confidential information.[23] The purpose of the predisclosure notification is to protect the submitter's right to maintain the confidentiality of sensitive information. This protection is accomplished through the procedural vehicle of a so-called "reverse FOIA" (Freedom of Information Act) action.

Submitters have similar rights under the CPRA. California courts recognize that "mandamus should be available to prevent a public agency from acting in an unlawful manner by releasing information the disclosure of which is prohibited by law."[24] This right to ensure that public agencies comply with the CPRA is illusory unless submitters receive notification that an agency intends to disclose information that is arguably protected from disclosure.

The Draft Resolution contends that staffing constraints and statutory timelines prevent it from issuing a predisclosure notification.[25] The Commission should not create a process that risks the disclosure of confidential information and then claim that it cannot devote the resources to properly administer the process. Moreover, the CPRA timelines do not present any barrier. The Draft Resolution appears to believe that the CPRA requires the Commission to disclose the actual documents within ten days. In fact, the CPRA only requires an agency to notify the requester

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17 Draft Resolution at 75.
18 *See* Draft Resolution at 74-75.
19 *BRV*, 143 Cal. App. 4th at 747-49.
20 *Id.* at 759.
21 *Id*.
22 Draft Resolution at 74.
23 *See* Exec. Order 12,600, 52 Fed. Reg. 23,781 (1987). San Diego Gas & Electric Company and Southern California Gas Company described Executive Order 12,600 in their comments filed on April 25, 2012.
24 *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 1266. (2012).
25 Draft Resolution at 30.

whether it has disclosable documents. "It does not require production within 10 days."[26] Moreover, the federal government offers a predisclosure notification despite similar time considerations.[27]

The imperative for a predisclosure notification is heightened regarding records previously submitted to the Commission. The process contemplated by the Draft Resolution may provide utilities with an advance indication whether their records will be subject to disclosure. However, no such process existed for previously submitted documents. The Draft Resolution indicates an awareness of this problem, but its promise that "we do not intend to make public every document previously filed … without providing some notice of our intentions" is too vague to assure utilities that they will actually receive notice.[28] The Draft Resolution should require a predisclosure notice in order to protect the utilities' confidential information and protect the utilities' right to monitor compliance with all applicable laws.

Secondary Users Must Comply with Protective Orders

SCE expects that the Commission will refuse to disclose records which are recognized as confidential. Nevertheless, section 2.2.1.4 of draft GO 66-D contemplates a scenario where a party receives access to records notwithstanding their confidential treatment. SCE assumes that this may occur in the context of a formal proceeding, where parties may exchange confidential information pursuant to a protective order. Section 2.2.1.4 acknowledges that the receiving party may file the confidential records in a proceeding, but it does not require the party to protect the records' confidentiality by filing them under seal. SCE requests that section 2.2.1.4 reiterate, as indicated in section 1.4.1, that the terms of an applicable protective order supersede GO 66-D. For example, if the protective order requires the receiving party to file confidential records under seal, the receiving party may not take advantage of section 2.2.1.4's non-mandatory language, which may otherwise be interpreted to give the receiving party the option of whether to file another party's confidential documents under seal.

The Standard Public and Confidential Status Resolution Provisions Require Modifications

SCE understands that the standard public and confidential status resolution is intended to avoid repetitive confidentiality requests. However, an entity-specific resolution must remain entirely separate from a broadly applicable matrix.[29] A matrix, as contemplated in the Draft Resolution, results from workshops and comments in which all interested parties will strongly advocate their positions. An entity-specific resolution, on the other hand, reflects a particular utility's interest at a particular time. GO 66-D should specify that an entity-specific standard resolution shall not be binding on any other party and shall not constitute precedent for any other party's confidentiality requests, including a request for a standard resolution.

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[26] *Motorola Communication & Elecs., Inc. v. Dep't of Gen. Servs.*, 55 Cal. App. 4th 1340, 1349 (1997).

[27] 5 U.S.C. § 552(a)(6)(A)(i) (20 days to notify requester); *cf. Marken*, 202 Cal. App. 4th at 1261 n.7 (CPRA is modeled on FOIA).

[28] *See* Draft Resolution at 92.

[29] As discussed above, SCE opposes a matrix to the extent it is used to prospectively determine whether information may be disclosed. This section provides constructive comments in the event the Commission decides to proceed with a matrix-based approach.

For these reasons, SCE opposes paragraph number 5 (on page 17 of draft GO 66-D). If certain utility information is similar across an industry, it should be addressed in a matrix. The validity of a party's request for confidential information must depend solely on the law, the Commission's orders, and the nature of the information. Another entity's treatment of similar information is irrelevant. SCE thus opposes creating a category of "optional confidential treatment." Information is either exempt from disclosure or not exempt from disclosure. While an entity may decide not to request confidential treatment, the CPRA does not recognize any intermediate category.

SCE also recommends omitting from paragraph number 6 (on page 17) the requirement that a corporate officer, at the time of seeking a standard resolution, acknowledge responsibility that all future requests for confidential treatment will comply with the Commission's orders. This provision ignores the reality that corporate officers change over time. Moreover, this provision is unnecessary. Rule 1.1 of the Commission's Rules of Practice and Procedure already requires persons transacting business with the Commission to comply with all laws, maintain the respect due to the Commission, and "never to mislead the Commission or its staff by an artifice or false statement of fact or law."

The contact information caveat at the end of section 3.1.2.2 also requires modifications. In general, SCE supports a requirement that the Commission notify parties before releasing confidential information. A prerelease notification would give parties an opportunity to challenge the Commission's decision and avoid the potential harm caused by disclosure, as discussed above. The contact information caveat, however, states that a party's non-response may be construed as reflecting an absence of concern regarding disclosure. A presumption in favor of disclosing confidential information should offer more due process protections to the regulated entity. At a minimum, GO 66-D should specify the period an entity has to respond, the method by which the Commission will contact the entity, and a proof of service or other attestation of compliance.

The Monthly Report and Electronic Filing Proposals Are Duplicative

Draft GO 66-D requires regulated entities to submit a monthly report detailing each request for confidential treatment.[30] The purpose of the report is to enable public review and assist the Public Records Office with its monthly resolution. Similarly, the Draft Resolution proposes a database that would record requests for confidential treatment. The purpose of the database, like the monthly report, is to enable public review.[31]

SCE prefers the database solution. All parties requesting confidential treatment would be able to submit information through an online database. In contrast, the monthly report requirement only applies to regulated entities. This option fails to enable public review of confidentiality requests submitted by unregulated entities. The database could also help the Public Records Office draft its monthly resolution. The Public Records Office could either extract information from the database for its resolution, or it could refer to the online filings.

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[30] *See* Draft GO 66-D, Section 3.1.2.3.
[31] *See* Draft Resolution at 104-05.

The monthly report would also be overly burdensome for regulated entities. Unlike the Draft Resolution's example of procurement compliance filings, these reports would cover all regulatory interactions—including informal exchanges of information—and the full spectrum of regulated business activities. The monthly report requirement also fails to recognize that requests for confidential treatment are not independent proceedings, but rather routine elements of regulatory proceedings and interactions. It would therefore be difficult for utilities to track their requests for confidential treatment in real time and across all business and regulatory activities. The database option would mitigate these difficulties because it would be a single procedural step integrated into the actual exchange of information.

Conclusion

SCE appreciates the work performed by Commission staff to develop the Draft Resolution and the proposed GO 66-D. SCE requests that the Commission consider these comments as it refines its approach to public access to records.

Sincerely,

/s/ AKBAR JAZAYERI
Akbar Jazayeri

cc: Janet Alviar (jva@cpuc.ca.gov), CPUC Legal Division
public.records@cpuc.ca.gov